2016

State of Utah, Plaintiff and Appellee, v. Carl Mack Courtney, Defendant and Appellant.

utah Court of Appeals

Case No. 20141172-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

CARL MACK COURTNEY,
Defendant/Appellant.

Brief of Appellee

Appeal from conviction for distributing or arranging to distribute a controlled substance, a second degree felony; in the second Judicial District, Weber County, the Honorable Michael D. DiReda presiding

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No Oral Argument Requested

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STATEMENT OF JURISDICTION

Defendant appeals from a conviction for distributing or arranging to distribute a controlled substance, a second degree felony. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West Supp. 2012).

INTRODUCTION

Defendant was caught selling methamphetamine in an undercover sting set up by the Weber-Morgan Narcotic Strike Force. At trial, a retired agent with the strike force was called as part of the jury venire. When asked if anyone knew either Defendant or defense counsel, the retired agent stated that she had had "affiliations with him" through the strike force. She did not offer and was not asked whether the "him" was Defendant or his counsel. She was excused for cause.

Defense counsel later passed the jury for cause. And after the jury was sworn, defense counsel moved for a mistrial. He argued that the retired agent's comment tainted the jury because the agent's familiarity with Defendant through her job on the task force would inform them that Defendant was involved in drugs. Defense counsel explained that he postponed the motion to avoid raising the issue before the jury. The trial court denied the motion both because it was untimely and because the comment was not prejudicial.

At trial, the jury heard (1) evidence establishing that Defendant was familiar to the task force; and (2) Defendant's admission that he had sold drugs before.

STATEMENT OF THE ISSUE

Has defendant overcome the strong presumption that postponing the mistrial motion fell within the wide range of reasonable assistance? Has Defendant shown that the excused juror's comment denied a trial before an impartial jury where the evidence at trial established the very thing he says her comment implied?

Standard of Review. An ineffective assistance claim raised for the first time on appeal is a question of law. *State v. Ott*, 2010 UT 1, ¶16, 247 P.3d 344.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional provisions, statutes, and rules are reproduced in Addendum A:

- Utah Code Annotated § 58-37-8(1) (Utah Controlled Substance Act)
- Utah R. Crim. P. 18 (selection of the jury)

STATEMENT OF THE CASE

A. Summary of facts.[1]

Detective Vanderwarf worked undercover for the Weber-Morgan Narcotics strike force. R.302:95, 102-103. He was assigned to accompany a confidential informant to buy sixty dollars' worth of methamphetamine from someone named "Skittles" at the Value Place Motel in Ogden. R.302:103-104, 127, 145, 147, 154. Det. Vanderwarf's assignment was not to arrest Skittles; rather, his job was to gain access to and information about the local drug scene. R.302:124. By "starting out buying small" and "working up the chain," Det. Vanderwarf and the strike force hoped to find the "big[] fish" who supplied the area's drugs. *Id.*

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[1] Consistent with appellate standards, the facts are stated in the light most favorable to the jury's verdict and conflicting evidence is presented only as needed to understand the issues raised on appeal. *See State v. Kruger*, 2000 UT 60, ¶2, 6 P.3d 1116.

Before the buy, Agent Ryan—who was supervising the operation—outfitted the informant with a live feed and audio recorder. R.302:105, 117-118, 127, 146. Agent Ryan also searched the informant to ensure that he did not have any drugs or weapons on him. R.302:105, 146-147. He found neither on the informant. *Id.* Agent Ryan then gave the informant sixty dollars to purchase the drugs. *Id.*

With agents from the strike force monitoring Det. Vanderwarf and the informant through the live feed, Det. Vanderwarf and the informant left for Skittles's motel room. R.302:105-106, 117-118. After knocking and entering the room, they discovered four people there. R.302:107, 109. A man and woman were standing near the door in a kitchenette area. R.302:107-110, 131, 132; State's Ex. 3. Just past the kitchenette, a man was sitting on a chair at a small table. R.302:109, 130; State's Ex. 3. He was wearing a black beanie. R.302:109, 111; State's Ex. 3. And on the far side of the room, a third man was lying on the farther of two beds watching TV. R.302:109-110, 129, 132; State's Ex. 3.

The informant, with Det. Vanderwarf following, walked over to the man at the table wearing the black beanie. R.302:110-111. Det. Vanderwarf noticed that there were no drugs on the table. R.302:139. Both stopped next to the table, standing about three to four feet away from the man in the

beanie. R.302:111, 131, 133. This man started "fiddling with something," or "preparing something." R.302:133. Det. Vanderwarf could not see what it was because his view was "partially blocked" by the informant. R.302:131, 133. While the man in the black beanie was "preparing" the "something," the man in the kitchenette passed the informant a gold coin and they talked about how much it might be worth. R.302:113, 121, 131, 136-137.

After a couple of minutes, the informant pointed to something on the table and asked the man in the black beanie, "is that me right there?" R.302:121-122, 133; State's Ex. 1 (audio recording from informant's recorder). The man in the black beanie answered, "I don't know." R.302:138; State's Ex. 1. In response, the informant asked if it was sixty dollars. R.302:122; State's Ex. 1. Det. Vanderwarf then watched the "informant hand the [man in the black beanie] the sixty dollars." R.302:113. In return, the man in the black beanie handed something to the informant. R.302:113-115. The informant immediately passed it to Det. Vanderwarf. *Id.* It was a small baggie filled with a "white crystal substance." R.302:113-115; State's Ex. 6. It later tested positive for methamphetamine. R.302:166-168; State's Ex. 4.

Besides Det. Vanderwarf, the informant, and the man in the black beanie, "there was nobody else standing around that table" during the

transaction. R.302:139, 171-172. The man in the bedroom remained on the bed the entire time and the man and woman stayed in the kitchenette. R.302:110, 115, 141.

After receiving the baggie, Det. Vanderwarf and the informant left the motel room. R.302:116. As they walked back to their rendezvous spot where Agent Ryan was waiting for them, the informant told Det. Vanderwarf that Skittles was actually the man who had been lying on the bed and that they had purchased the drugs from "Carl." R.302:116, 122-123. Det. Vanderwarf had heard the name Carl before. R.302:116. Other agents on the strike force were also "familiar" with Carl and they showed Det. Vanderwarf a photo. R.302:117. Det. Vanderwarf told them "yes," "[t]his was the person we just bought dope from." R.302:117.

Four months later, Det. Vanderwarf arrested Carl. R.302:124-125. He asked Carl if he had sold meth in the last six months. R.302:126, 140. Carl "nodded" yes and explained that "he sells to make ends meet." *Id.*

B. Summary of proceedings.

Defendant Carl Courtney was charged with distributing or arranging to distribute a controlled substance, a second degree felony. R.6. He pleaded not guilty and the case proceeded to trial. R.16; R.302.

Jury Selection

After some preliminary questions, the trial court asked members of the jury venire to introduce themselves by reporting aloud the "general information" about themselves that they had answered in a juror questionnaire. R.302:11-21. On her turn, prospective Juror 5 said that she "recently retired as a sergeant with the Riverdale Police Department" and that her "husband recently retired from the Weber County Sheriff's Office and now is in private probation." R.302:14.[2]

After jury venire's introductions, the prosecutor introduced himself and named the witnesses that he would call at trial, including Det. Vanderwarf. R.302:21-22. When asked if anyone knew the prosecutor or the State's witnesses, prospective Juror 5 was one of three veniremen who raised her hand. R.302:22-23. Prospective Juror 5 explained that she knew Det. Vanderwarf from "work" and that they were "friends." R.302:22.

When asked if any members of the venire knew either defense counsel or Defendant, prospective Juror 5 again raised her hand and said, "Due to my years in law enforcement, yes. I have had affiliations with *him*, especially during the time that I was serving as an agent for the Weber-

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[2] During jury selection, prospective Juror 5 was identified by name. *See generally* R.302:22-44. To protect her privacy, however, the State refers to her by her juror number in its brief. *See* R.302:57 (identifying as Juror 5).

Morgan Narcotics Strike Force." R.302:23 (emphasis added). Another prospective juror immediately stated that she knew defense counsel because he had represented her husband in a case. *Id.* The State, the trial court, and defense counsel asked prospective Juror 5 no follow-up questions or otherwise commented on her statement. *Id.*

Later, the trial court asked the venire if "any of you believe that because the defendant has been charged in this case by the State that there must be some basis for his guilt?" R.302:39. Prospective Juror 5 raised her hand. R.302:39, 60. Before allowing prospective Juror 5 to respond, the trial court asked counsel to approach. R.302:39. At a bench conference, the trial court expressed concern that prospective Juror 5 could "taint[] the jury pool" if she answered the question in front of the venire. R.302:39. The prosecutor suggested that prospective Juror 5 "be excused." R.302:40. Defense counsel stated that he was not sure "how to handle this," but proposed that prospective Juror 5 be taken to the trial court's chambers to answer the question. R.302:40. The trial court, however, suggested that it excuse prospective Juror 5 under the pretense that she had a conflict with the trial court because her husband appeared before the court as a probation officer. R.302:41. That way, the trial court explained, prospective Juror 5's dismissal would not be connected to any of the jury selection questions. *Id.*

After further discussion, defense counsel agreed that the trial court's suggestion was the "best approach." R.302:42-43. He rejected the suggestion that the remaining members of the venire be asked curative questions after prospective Juror 5 was excused. *Id.* While defense counsel agreed that prospective Juror 5's answer to whether she knew Defendant or defense counsel "sort of goes to the whole 404 issue . . . in a very roundabout way without being specific," he felt further questions would be "loaded" and would simply draw the venire's attention to the issue. R.302:42-43.

The trial court thus excused prospective Juror 5, explaining that it was doing so because her husband appeared before the court as a probation officer. R.37; R.302:43-44, 46. The trial court did not ask the venire any curative questions, but moved on with voir dire, asking if any of the remaining members of the venire believed that because Defendant had been charged by the State "that there must be some basis for his guilt." R.302:44-45. No one answered affirmatively. R.302:45. Likewise, no one agreed that he or she would give more weight to law enforcement testimony or that he or she could not follow the law as instructed by the trial court. R.302:45.

Defense counsel then passed the jury for cause. R.302:49. After the parties exercised their preemptory challenges, the jury was sworn. R.302:55-56.

The trial court then took a recess and defense counsel put on the record the circumstances surrounding prospective Juror 5's excusal. R.302:57. He explained that prospective Juror 5 knew Defendant from her time on the Weber-Morgan Narcotics Strike Force and that Defendant had even "testified at a grand jury on issues where she set up controlled buys." R.302:57. While defense counsel conceded that prospective Juror 5 did not "go into detail" when she answered whether she knew Defendant or defense counsel, he believed that there was a "possible issue" that the jury was tainted by prospective Juror 5's response. R.302:58, 60.

The trial court responded that while it believed that prospective Juror 5 "ought to be bitch-slapped" for going "beyond the simple question of do you know" Defendant or defense counsel, it observed that defense counsel did not object to the venire or move for a "mistrial," but instead agreed to excuse Juror 5 without further action "in an effort to try to avoid drawing additional attention" to Juror 5's response. R.302:59-62, 67-69. The trial court then expressed concern that if defense counsel were to move for a mistrial now, it would not be timely because jeopardy had attached upon

the jury's swearing in. R.302:61-62. It stated that the "likelihood" that it would grant a mistrial motion was now "very slim" and that defense counsel might be considered "ineffective" for not having made the motion earlier. R.302:66.

Defense counsel agreed that he had not made a mistrial motion but explained that he did not do so because he "didn't want to draw more attention from the Jury panel as we were selecting them about what was taking place." R.302:63. He further explained that he "thought" the time to move for a mistrial "was after the jury was picked" and that he "actually want[ed] for the jeopardy to attach." R.302:63, 66.

Defense counsel asked for time to discuss the matter with Defendant. *See* R.302:70. After consultation, defense counsel moved for a mistrial "due to the tainting of the jury due to Juror Number 5's comments." R.302:70-71.

The trial court denied Defendant's mistrial motion on two grounds. R.302:71-72. First, it ruled that the motion was untimely. R.302:72. Second, it ruled that there was no evidence that the jury was tainted because prospective Juror 5's statement "occurred early on," "was generic, innocuous, non-specific," and "did not specify Defendant's role." R.302:71.

Trial

Det. Vanderwarf, Agent Ryan, and a forensic scientist from the Utah State Crime Lab testified at trial. *See* R.302. The jury also listened to the informant's audio recording of the buy. R.302:119-123; State's Ex. 1.

Defendant did not put on any evidence. R.302:183-184. Instead, he argued that the evidence failed to show that Defendant was involved in the transaction. R.302:204-212. Although Defendant admitted that he was the only person sitting at the table when the transaction occurred, he pointed out that Det. Vanderwarf did not see an actual "hand-to-hand transaction." R.302:206. Instead, he claimed that Skittles had really sold the informant the drugs: Skittles arranged the buy and he had left the drugs for the informant on the table. R.302:204-212. He argued that the informant had taken the drugs from the table and then replaced it with the money. *Id.*

The jury was not persuaded. It found Defendant guilty of one count of distributing or arranging to distribute a controlled substance. R.45; R.302:220. The trial court sentenced Defendant to a prison term of one-to-fifteen years to run consecutively to his sentences in three other cases. R.181-182; R.303:9-10.

Defendant timely appealed after the trial court reinstated his time to appeal. R.256, 259, 268.

SUMMARY OF ARGUMENT

Defendant argues that prospective Juror 5's comment that she knew Defendant or defense counsel through her former job on the strike force tainted the jury panel because it may have informed them that Defendant was involved with drugs. He argues that his trial counsel should have moved for a mistrial on this ground before the jury was sworn because—according to him—well-established law requires a mistrial motion be made before the jury is sworn. And he asserts that the trial court likely would have granted the motion had trial counsel made it before, not after, the jury was sworn.

Defendant's argument fails because defense counsel did not perform deficiently; nor did Defendant suffer any prejudice.

Defendant's argument about trial counsel's timing on the mistrial motion misunderstands the law. The governing rule does require challenging the *panel* before the jury is sworn. But it restricts challenges to the panel to a failure to follow the statutory procedure for selecting, drawing, summoning, and return of the venire. It does not permit challenges to the entire panel based on information that may taint the jury's ability to decide the case impartially.

Trial counsel properly chose to postpone that challenge. Moving for a mistrial in front of the entire panel may have emphasized for the jurors who would decide his case the comment that he now says may have suggested to them that he was involved in other crimes. And even if counsel could have moved for a mistrial outside of the venire's hearing and before the jury was sworn, the motion could have succeeded only on a showing of individual bias. But to ferret that out would have required voir dire on the very thing counsel sought to avoid emphasizing for the jury. And although even that motion should ordinarily be made before the jury is sworn, trial courts may consider a mistrial motion made after the jury is sworn if it is made before any evidence has been presented.

In any event, Defendant suffered no prejudice. Defendant contends that the trial court likely would have granted the motion had counsel made it before the jury was sworn. The court's ruling shows otherwise. Although the court denied the motion on timeliness grounds, it also denied it on the merits.

And whether the trial court would have granted the motion is not the full measure of prejudice. Rather, defendant must prove that a biased jury tried him. He has not met and cannot meet that burden. First, prospective Juror 5's comment did not likely prejudice the jury because she did not

indicate with whom she had "affiliations"—defense counsel or Defendant. Second, the timing of Defendant's mistrial motion did not matter because the trial court alternatively denied the motion on the merits. Third, the jury eventually heard testimony on the very thing defendant complains prospective Juror 5's comment may have informed them about—the agents in the Weber-Morgan Narcotics Strike Force were familiar with Defendant. And they heard evidence that Defendant admitted that he had sold drugs before.

ARGUMENT

TRIAL COUNSEL COULD NOT HAVE CHALLENGED THE ENTIRE VENIRE BASED ON POSSIBLE BIAS, AND HE PROPERLY POSTPONED HIS MISTRIAL MOTION ON THAT BASIS TO AVOID EXPOSING THE JURY TO MATTERS THAT MAY HAVE SUGGESTED DEFENDANT WAS INVOLVED IN OTHER CRIMES; DEFENDANT HAS NOT PROVED PREJUDICE IN ANY EVENT

To succeed on an ineffective assistance of counsel claim, Defendant must demonstrate both that (1) his counsel performed deficiently and (2) he was prejudiced as a result. *See Strickland v. Washington*, 466 U.S. 668, 687-89, 694 (1984); *State v. Litherland*, 2000 UT 76, ¶19, 12 P.3d 92. Because Defendant has shown neither, his argument fails.

Defendant argues that his trial counsel should have moved for a mistrial before the jury was sworn on the grounds that prospective Juror 5's

"prejudicial comments . . . tainted the jury panel during voir dire." Br.Aplt. 8. He further claims that defense counsel's late action prejudiced him because "if trial counsel had timely moved for a mistrial, the district court would have likely granted it." Br.Aplt. 15.

Defendant is mistaken on both counts.

A. Defense counsel properly chose to postpone his mistrial motion.

To prove deficient performance, Defendant must show that his counsel's performance "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. This standard presumes that counsel was competent. *State v. Tennyson*, 850 P.2d 461, 468 (Utah App. 1993). Defendant can thus prevail only by "rebut[ting] the strong presumption that under the circumstances the challenged action might be considered sound trial strategy." *Litherland*, 2000 UT 76, ¶19 (citation and internal quotation marks omitted). And he can do so "only if there is a lack of any conceivable tactical basis for counsel's actions." *State v. King*, 2012 UT App 203, ¶14, 283 P.3d 980 (citation and internal quotation marks omitted). *See also Tennyson*, 850 P.2d 461, 468 (holding that "ineffective assistance claim succeeds only when no conceivable legitimate tactic or strategy can be surmised from counsel's actions"). Indeed, *Strickland* does not require counsel to make "futile" motions or arguments. *State v. Kelley*, 2000 UT 41,

¶26, 1 P.3d 546. *See also State v. Chacon*, 962 P.2d 48, 51 (Utah 1998) ("Neither speculative claims nor counsel's failure to make futile objections establishes ineffective assistance of counsel.").

Defendant claims that trial counsel improperly postponed the mistrial motion until after the jury was sworn. He argues that counsel should have known that he had to make the motion before the jury was sworn.

Defendant misunderstands the interplay between the mistrial motion trial counsel made and the governing rules. Trial counsel moved for a mistrial on the ground that prospective Juror 5's comment may have informed the jurors that Defendant had committed other crimes. Therefore, trial counsel founded the motion on a challenge to the jury's impartiality. Challenges to juror bias must be against "an *individual* juror." Utah R. Crim. P. 18(c)(2); (18)(e)(4)-(14) (emphasis added). It requires questioning to determine whether a prospective juror is actually biased or cannot "act impartially." *Id.* at 18(e)(14) & advisory committee note. *See also State v. Flores*, 2015 UT App 88, ¶15, 348 P.3d 361 (explaining that "[v]oir dire examination serves two purposes: 'the detection of *actual* bias . . . and the collection of data to permit informed exercise of the peremptory challenge"). *Cf. Gardner v. Galetka*, 568 F.3d 862, 889 (10th Cir. 2009) (holding that "change of venue is warranted when 'the jurors demonstrated

actual partiality or hostility that [could] not be laid aside'") (quoting *Jeffries v. Blodgett*, 5 F.3d 1180, 1189 (9th Cir. 1993)).

And while those motions ordinarily should be made before the jury is sworn, the trial court may allow a challenge after the jury is sworn, but before any evidence has been presented. *See* Utah R. Crim. P. 18(c)(2).

Trial counsel properly chose to postpone his motion. After prospective Juror 5's comments, defense counsel faced two choices: first, he could challenge each prospective juror individually to determine if he or she was actually biased or unable to act impartially; or second, he could proceed with the selection process without challenge or comment in order to avoid drawing any further attention to prospective Juror 5's responses. Choosing to move forward without challenge was an objectively reasonable choice. *Cf. State v. Garrido*, 2013 UT App 245, ¶26, 314 P.3d 1014, 1023 ("Choosing to forgo a limiting instruction can be a reasonable decision to avoid drawing attention to unfavorable testimony"); *State v. Harter*, 2007 UT App 5, ¶16, 155 P.3d 116 (holding failure to request limiting instruction was not ineffective assistance of counsel because such instruction could have drawn jury's attention to defendant's flight from police officers). Indeed, defense counsel explained to the trial court that he had not moved for a mistrial before the jury was sworn because he "didn't want to draw more attention

from the Jury panel as we were selecting them about what was taking place." R.302:63.

By postponing the motion, defense counsel could move for a mistrial on the same basis, without forcing the trial court to question each individual prospective juror and drawing their attention to prospective Juror 5's comment. If defense counsel lost the motion, the jury would be none the wiser. And even if defense counsel's choice risked having the motion denied as untimely, it was objectively reasonable to take that chance to avoid emphasizing prospective Juror 5's comments by raising the issue sooner. For counsel's performance to be constitutionally deficient, "it must have been completely unreasonable, not merely wrong." *Boyd v. Ward*, 179 F.3d 904, 913 (10th Cir. 1999).[3]

Defendant has not shown otherwise. He argues that rule 18 requires challenging the *panel* before the jury is sworn. But that rule allows a party to challenge the entire panel in only one circumstance: a failure to follow the statutory procedure for the selecting, drawing, summoning, and return

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[3] Counsel's call was proven correct on the whole. While the trial court did deny the motion as untimely, it also denied it on the merits. *See* R.302:71 (denying Defendant's mistrial motion because there was no evidence the jury was tainted where prospective Juror 5's comment "occurred early on," "was generic, innocuous, non-specific," and "did not specify Defendant's role").

of the venire. Utah R. Crim. P. 18(c)(1)(i), (ii) ("A challenge to the panel can be founded *only* on a material departure from the procedure prescribed with respect to the selection, drawing, summoning and return of the panel.") (emphasis added). *See also State v. Suarez*, 793 P.2d 934 (Utah App. 1990) (challenge to entire jury venire for not complying with procedure for drawing veniremen).

Indeed, even though defense counsel could have moved for a mistrial after the jury was selected, but before it was sworn, he still could not have challenged the *entire* panel on this ground. Utah R. Crim. P. 18(c)(1)(i), (ii). And he could not have made this motion outside of the jury panel's hearing at this time—the very event he sought to avoid. *See* R.55-56. Moreover, because the trial court expressed its concerns with prospective Juror 5's comments, defense counsel could very well have reasonably believed that the trial court would grant his motion despite his not doing so earlier.

Because moving for a mistrial on the basis that the entire jury venire was "tainted" would have been insupportable, defense counsel properly chose not to make this futile motion. *Kelley*, 2000 UT 41, ¶26.

In sum, Defendant has not "overcome the presumption that . . . the challenged action 'might be considered sound trial strategy.'" *See Strickland*,

466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). He therefore has failed to show deficient performance.

B. Defendant has not shown that the jury could not decide his case fairly.

Defendant's ineffective assistance of counsel claim also fails because he cannot show prejudice. Defendant argues that "the trial would have turned out differently" because the trial court would likely have granted defense counsel's motion if he had made it before the jury was sworn. Br.Aplt. 15-16. He further asserts that the outcome would have been different "had the jury panel not been exposed to the tainting remark" because the evidence against him was weak. Br.Aplt. 17-19.

To "establish prejudice, Defendant must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the *proceeding* would have been different.'" *State v. Millward*, 2010 UT App 355, ¶14, 246 P.3d 151 (emphasis added) (quoting *State v. Vos*, 2007 UT App 215, ¶12, 164 P.3d 1258). The "likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 131 S. Ct. 770, 792 (2011). Defendant thus must show that there was a substantial likelihood that the result of *trial* would have been different. He cannot make such a showing here.

Filing the motion sooner would not have changed the trial court's disposition of it. The trial court also denied it on the merits.

And succeeding on the motion is not enough. Defendant must show that denying result in a trial before a jury that was not impartial. He has not shown that prospective Juror 5's comment biased the jury.

Prospective Juror 5's comments did not clearly show a prior link between defendant and law enforcement, or that Defendant had committed prior crimes. As the trial court recognized, the comment "occurred early on," was "generic, innocuous, non-specific," and "did not specify Defendant's role." R.302:71. That was correct. When asked if anyone knew either defense counsel or Defendant, prospective Juror 5 answered, "Due to my years in law enforcement, yes. I have had affiliations with *him*, especially during the time that I was serving as an agent for the Weber-Morgan Narcotics Strike Force." R.302:23 (emphasis added). No follow-up questions clarified who "him" was. *Id.*

The other prospective jurors could have understood that when prospective Juror 5 stated that she had "affiliations" through the strike force with "*him*," she was referring to defense counsel, not Defendant. R.302:23 (emphasis added). Because they knew that prospective Juror 5 worked in

law enforcement, they may well have concluded that her "affiliations" were with the criminal defense attorney representing Defendant.

But even if they understood her to refer to Defendant, that does not mean they would have drawn the conclusion that Defendant had committed prior crimes. His "affiliation[]" could have been understood to be as a witness, a victim, or a confidential informant.

Indeed, Defendant has failed to show more than a speculative possibility that the jury venire was prejudiced. But speculation is not enough. *See State v. Mead*, 2001 UT 58, ¶34, 27 P.3d 1115 (holding that "Mead must show he was actually prejudiced . . . the possibility of prejudice alone is insufficient"). *Cf. Lafferty v. State*, 2007 UT 73, ¶20, 175 P.3d 530, (holding that Lafferty's trial counsel was not ineffective in failing to request jury sequestration where he failed to provide any evidence showing that the publicity surrounding the trial created prejudice "among the jurors who were actually seated"); *Burton v. Zions Co-op. Mercantile Inst.*, 249 P.2d 514, 517 (Utah 1952) (holding that mistrial is necessary only where "fair trial cannot be had"); *State v. Wach*, 2001 UT 35, ¶41, 24 P.3d 948 (holding that Wach did not meet burden to show jurors "could not act in a fair and impartial manner"); *State v. Gibbs*, 436 S.E.2d 321 (N.C. 1993) (holding that

Gibbs failed present any evidence that jurors were affected by prospective juror's belief that Gibbs was guilty).

And the comment could not have prejudiced Defendant. The jury heard testimony that members of the strike force were familiar with Defendant anyway. Det. Vanderwarf testified that the informant told him that they had purchased the baggie from "Carl." R.302:116, 122-123. Det. Vanderwarf testified that he had heard the name Carl before while working on the strike force. R.302:116. And he testified that other agents on the strike force were also "familiar" with Defendant; even bringing him a photo of Defendant to identify. R.302:117. And they heard Det. Vanderwarf's testimony that Defendant admitted he had sold drugs before. So the unchallenged and admissible evidence established the very thing Defendant says prospective Juror 5's comment may have implied—he was involved in selling drugs. *Cf. Gardner*, 568 F.3d at 888-889 (holding that prospective jurors' knowledge of facts of case did not deprive Gardner of fair trial where he did not show fair jury could not be seated)

Indeed, the evidence against Defendant was strong. Det. Vanderwarf testified that the informant bought the drugs from Defendant, not Skittles. Indeed, the undisputed evidence was that no one but Defendant was near the informant during the exchange. *See* R.302:139, 171-172.

Det. Vanderwarf testified that there were no drugs on the table when they first arrived and that Defendant was "preparing" something while they waited. R.302:133, 139. And the jury listened to the audio recording that corroborated Det. Vanderwarf's account. R.302:119-123; State's Ex. 1. And they heard testimony that Defendant admitted that he had recently sold drugs. R.302:126, 140.

Moreover, the jury was instructed that Defendant was presumed innocent and that the jury must base its decision only on the evidence presented at trial. R.53 (Jury Instr. 8); R.55 (Jury Instr. 10); R.87 (Jury Instr. 37). Appellate courts "presume" that juries follow the instructions. *See State v. Harmon*, 956 P.2d 262, 271-273 (Utah 1998) (holding that juries are presumed to follow jury instruction to "disregard inadmissible evidence inadvertently presented to it, unless there is an overwhelming probability that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be devastating to the defendant'") (quoting *Greer v. Miller*, 483 U.S. 756, 767 n.8 (1987)); *Tooele Associates Ltd. P'ship v. Tooele City*, 2012 UT App 214, ¶ 11, 284 P.3d 709, 713 ("[W]e presume that the jury followed the jury instructions."); *State v. Nelson*, 2011 UT App 107, ¶4, 253 P.3d 1094 ("In the absence of the appearance of something persuasive to the contrary, we assume that the

jurors were conscientious in performing . . . their duty, and that they followed the instructions of the court.") (quoting *State v. Burk*, 859 P.2d 880, 883 (Utah App. 1992).

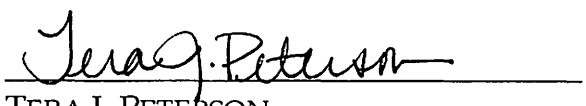
Because Defendant has failed to show any prejudice, his ineffective assistance of counsel claim fails. *Millward*, 2010 UT App 355, ¶14.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on February 16, 2016.

SEAN D. REYES
Utah Attorney General



TERA J. PETERSON
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on February 16, 2016, two copies of the Brief of Appellee were ☑ mailed ☐ hand-delivered to:

Emily Adams
Adams Legal LLC
1310 Madera Hills Drive
Bountiful, UT 84010

Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format (pdf):

☑ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.

Jee Nakamura

Addenda

Addendum A

Utah Code Annotated § 58-37-8. Prohibited acts—Penalties

(1) Prohibited acts A--Penalties:

(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

(i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;

(iii) possess a controlled or counterfeit substance with intent to distribute; or

(iv) engage in a continuing criminal enterprise where:

(A) the person participates, directs, or engages in conduct which results in any violation of any provision of Title 58, Chapters 37, 37a, 37b, 37c, or 37d that is a felony; and

(B) the violation is a part of a continuing series of two or more violations of Title 58, Chapters 37, 37a, 37b, 37c, or 37d on separate occasions that are undertaken in concert with five or more persons with respect to whom the person occupies a position of organizer, supervisor, or any other position of management.

(b) Any person convicted of violating Subsection (1)(a) with respect to:

(i) a substance or a counterfeit of a substance classified in Schedule I or II, a controlled substance analog, or gammahydroxybutyric acid as listed in Schedule III is guilty of a second degree felony and upon a second or subsequent conviction is guilty of a first degree felony;

(ii) a substance or a counterfeit of a substance classified in Schedule III or IV, or marijuana, or a substance listed in Section 58-37-4.2 is guilty of a third degree felony, and upon a second or subsequent conviction is guilty of a second degree felony; or

(iii) a substance or a counterfeit of a substance classified in Schedule V is guilty of a class A misdemeanor and upon a second or subsequent conviction is guilty of a third degree felony.

(c) Any person who has been convicted of a violation of Subsection (1)(a)(ii) or (iii) may be sentenced to imprisonment for an indeterminate term as provided by law, but if the trier of fact finds a firearm as defined in Section 76-10-501 was used, carried, or possessed on his person or in his immediate possession during the commission or in furtherance of the offense, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence

the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently.

(d) Any person convicted of violating Subsection (1)(a)(iv) is guilty of a first degree felony punishable by imprisonment for an indeterminate term of not less than seven years and which may be for life. Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(2) Prohibited acts B--Penalties:

(a) It is unlawful:

(i) for any person knowingly and intentionally to possess or use a controlled substance analog or a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of the person's professional practice, or as otherwise authorized by this chapter;

(ii) for any owner, tenant, licensee, or person in control of any building, room, tenement, vehicle, boat, aircraft, or other place knowingly and intentionally to permit them to be occupied by persons unlawfully possessing, using, or distributing controlled substances in any of those locations; or

(iii) for any person knowingly and intentionally to possess an altered or forged prescription or written order for a controlled substance.

(b) Any person convicted of violating Subsection (2)(a)(i) with respect to:

(i) marijuana, if the amount is 100 pounds or more, is guilty of a second degree felony;

(ii) a substance classified in Schedule I or II, marijuana, if the amount is more than 16 ounces, but less than 100 pounds, or a controlled substance analog, is guilty of a third degree felony; or

(iii) marijuana, if the marijuana is not in the form of an extracted resin from any part of the plant, and the amount is more than one ounce but less than 16 ounces, is guilty of a class A misdemeanor.

(c) Upon a person's conviction of a violation of this Subsection (2) subsequent to a conviction under Subsection (1)(a), that person shall be sentenced to a one degree greater penalty than provided in this Subsection (2).

(d) Any person who violates Subsection (2)(a)(i) with respect to all other controlled substances not included in Subsection (2)(b)(i), (ii), or (iii), including a substance listed in Section 58-37-4.2, or less than one ounce of marijuana, is guilty of a class B misdemeanor. Upon a second conviction the person is guilty of a class A misdemeanor, and upon a third or subsequent conviction the person is guilty of a third degree felony.

(e) Any person convicted of violating Subsection (2)(a)(i) while inside the exterior boundaries of property occupied by any correctional facility as defined in Section 64-13-1 or any public jail or other place of confinement shall be sentenced to a penalty one degree greater than provided in Subsection (2)(b), and if the conviction is with respect to controlled substances as listed in:

(i) Subsection (2)(b), the person may be sentenced to imprisonment for an indeterminate term as provided by law, and:

(A) the court shall additionally sentence the person convicted to a term of one year to run consecutively and not concurrently; and

(B) the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently; and

(ii) Subsection (2)(d), the person may be sentenced to imprisonment for an indeterminate term as provided by law, and the court shall additionally sentence the person convicted to a term of six months to run consecutively and not concurrently.

(f) Any person convicted of violating Subsection (2)(a)(ii) or (iii) is:

(i) on a first conviction, guilty of a class B misdemeanor;

(ii) on a second conviction, guilty of a class A misdemeanor; and

(iii) on a third or subsequent conviction, guilty of a third degree felony.

(g) A person is subject to the penalties under Subsection (2)(h) who, in an offense not amounting to a violation of Section 76-5-207:

(i) violates Subsection (2)(a)(i) by knowingly and intentionally having in the person's body any measurable amount of a controlled substance; and

(ii) operates a motor vehicle as defined in Section 76-5-207 in a negligent manner, causing serious bodily injury as defined in Section 76-1-601 or the death of another.

(h) A person who violates Subsection (2)(g) by having in the person's body:

(i) a controlled substance classified under Schedule I, other than those described in Subsection (2)(h)(ii), or a controlled substance classified under Schedule II is guilty of a second degree felony;

(ii) marijuana, tetrahydrocannabinols, or equivalents described in Subsection 58-37-4 (2)(a)(iii)(S) or (AA), or a substance listed in Section 58-37-4.2 is guilty of a third degree felony; or

(iii) any controlled substance classified under Schedules III, IV, or V is guilty of a class A misdemeanor.

(i) A person is guilty of a separate offense for each victim suffering serious bodily injury or death as a result of the person's negligent driving in violation

of Subsection 58-37-8 (2)(g) whether or not the injuries arise from the same episode of driving.

(3) Prohibited acts C--Penalties:

(a) It is unlawful for any person knowingly and intentionally:

(i) to use in the course of the manufacture or distribution of a controlled substance a license number which is fictitious, revoked, suspended, or issued to another person or, for the purpose of obtaining a controlled substance, to assume the title of, or represent oneself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person;

(ii) to acquire or obtain possession of, to procure or attempt to procure the administration of, to obtain a prescription for, to prescribe or dispense to any person known to be attempting to acquire or obtain possession of, or to procure the administration of any controlled substance by misrepresentation or failure by the person to disclose receiving any controlled substance from another source, fraud, forgery, deception, subterfuge, alteration of a prescription or written order for a controlled substance, or the use of a false name or address;

(iii) to make any false or forged prescription or written order for a controlled substance, or to utter the same, or to alter any prescription or written order issued or written under the terms of this chapter; or

(iv) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling so as to render any drug a counterfeit controlled substance.

(b) Any person convicted of violating Subsection (3)(a) is guilty of a third degree felony.

(4) Prohibited acts D--Penalties:

(a) Notwithstanding other provisions of this section, a person not authorized under this chapter who commits any act declared to be unlawful under this section, Title 58, Chapter 37a, Utah Drug Paraphernalia Act, or under Title 58, Chapter 37b, Imitation Controlled Substances Act, is upon conviction subject to the penalties and classifications under this Subsection (4) if the trier of fact finds the act is committed:

(i) in a public or private elementary or secondary school or on the grounds of any of those schools;

(ii) in a public or private vocational school or postsecondary institution or on the grounds of any of those schools or institutions;
(iii) in those portions of any building, park, stadium, or other structure or grounds which are, at the time of the act, being used for an activity sponsored by or through a school or institution under Subsections (4)(a)(i) and (ii);
(iv) in or on the grounds of a preschool or child-care facility;
(v) in a public park, amusement park, arcade, or recreation center;
(vi) in or on the grounds of a house of worship as defined in Section 76-10-501;
(vii) in a shopping mall, sports facility, stadium, arena, theater, movie house, playhouse, or parking lot or structure adjacent thereto;
(viii) in or on the grounds of a library;
(ix) within any area that is within 1,000 feet of any structure, facility, or grounds included in Subsections (4)(a)(i), (ii), (iv), (vi), and (vii);
(x) in the presence of a person younger than 18 years of age, regardless of where the act occurs; or
(xi) for the purpose of facilitating, arranging, or causing the transport, delivery, or distribution of a substance in violation of this section to an inmate or on the grounds of any correctional facility as defined in Section 76-8-311.3.

(b) (i) A person convicted under this Subsection (4) is guilty of a first degree felony and shall be imprisoned for a term of not less than five years if the penalty that would otherwise have been established but for this Subsection (4) would have been a first degree felony.
(ii) Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(c) If the classification that would otherwise have been established would have been less than a first degree felony but for this Subsection (4), a person convicted under this Subsection (4) is guilty of one degree more than the maximum penalty prescribed for that offense. This Subsection (4)(c) does not apply to a violation of Subsection (2)(g).

(d) (i) If the violation is of Subsection (4)(a)(xi):
(A) the person may be sentenced to imprisonment for an indeterminate term as provided by law, and the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and
(B) the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently; and

(ii) the penalties under this Subsection (4)(d) apply also to any person who, acting with the mental state required for the commission of an offense, directly or indirectly solicits, requests, commands, coerces, encourages, or intentionally aids another person to commit a violation of Subsection (4)(a)(xi).

(e) It is not a defense to a prosecution under this Subsection (4) that the actor mistakenly believed the individual to be 18 years of age or older at the time of the offense or was unaware of the individual's true age; nor that the actor mistakenly believed that the location where the act occurred was not as described in Subsection (4)(a) or was unaware that the location where the act occurred was as described in Subsection (4)(a).

(5) Any violation of this chapter for which no penalty is specified is a class B misdemeanor.

(6) For purposes of penalty enhancement under Subsections (1)(b) and (2)(c), a plea of guilty or no contest to a violation of this section which is held in abeyance under Title 77, Chapter 2a, Pleas in Abeyance, is the equivalent of a conviction, even if the charge has been subsequently reduced or dismissed in accordance with the plea in abeyance agreement.

(7) A person may be charged and sentenced for a violation of this section, notwithstanding a charge and sentence for a violation of any other section of this chapter.

(8) (a) Any penalty imposed for violation of this section is in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

(b) Where violation of this chapter violates a federal law or the law of another state, conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.

(9) In any prosecution for a violation of this chapter, evidence or proof which shows a person or persons produced, manufactured, possessed, distributed, or dispensed a controlled substance or substances, is prima facie evidence that the person or persons did so with knowledge of the character of the substance or substances.

(10) This section does not prohibit a veterinarian, in good faith and in the course of the veterinarian's professional practice only and not for humans, from prescribing, dispensing, or administering controlled substances or from causing

the substances to be administered by an assistant or orderly under the veterinarian's direction and supervision.

(11) Civil or criminal liability may not be imposed under this section on:
(a) any person registered under this chapter who manufactures, distributes, or possesses an imitation controlled substance for use as a placebo or investigational new drug by a registered practitioner in the ordinary course of professional practice or research; or
(b) any law enforcement officer acting in the course and legitimate scope of the officer's employment.

(12)(a) Civil or criminal liability may not be imposed under this section on any Indian, as defined in Subsection 58-37-2(1)(v), who uses, possesses, or transports peyote for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion as defined in Subsection 58-37-2(1)(w).
(b) In a prosecution alleging violation of this section regarding peyote as defined in Subsection 58-37-4(2)(a)(iii)(V), it is an affirmative defense that the peyote was used, possessed, or transported by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion.
(c) (i) The defendant shall provide written notice of intent to claim an affirmative defense under this Subsection (12) as soon as practicable, but not later than 10 days prior to trial.
(ii) The notice shall include the specific claims of the affirmative defense.
(iii) The court may waive the notice requirement in the interest of justice for good cause shown, if the prosecutor is not unfairly prejudiced by the lack of timely notice.
(d) The defendant shall establish the affirmative defense under this Subsection (12) by a preponderance of the evidence. If the defense is established, it is a complete defense to the charges.

(13)(a) It is an affirmative defense that the person produced, possessed, or administered a controlled substance listed in Section 58-37-4.2 if the person:
(i) was engaged in medical research; and
(ii) was a holder of a valid license to possess controlled substances under Section 58-37-6.
(b) It is not a defense under Subsection (13)(a) that the person prescribed or dispensed a controlled substance listed in Section 58-37-4.2.

(14) It is an affirmative defense that the person possessed, in the person's body, a controlled substance listed inSection 58-37-4.2 if:

(a) the person was the subject of medical research conducted by a holder of a valid license to possess controlled substances under Section 58-37-6; and

(b) the substance was administered to the person by the medical researcher.

(15) If any provision of this chapter, or the application of any provision to any person or circumstances, is held invalid, the remainder of this chapter shall be given effect without the invalid provision or application.

(16) A legislative body of a political subdivision may not enact an ordinance that is less restrictive than any provision of this chapter.

Utah R. Crim. P. 18. Selection of the Jury

(a) The judge shall determine the method of selecting the jury and notify the parties at a pretrial conference or otherwise prior to trial. The following procedures for selection are not exclusive.

(a)(1) *Strike and replace method.* The court shall summon the number of the jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted, and for all challenges for cause granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. After each challenge for cause sustained, another juror shall be called to fill the vacancy, and any such new juror may be challenged for cause. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the prosecution, shall indicate thereon its peremptory challenge to one juror at a time in regular turn, as the court may direct, until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(a)(2) *Struck method.* The court shall summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted and for all challenges for cause granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the prosecution, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(a)(3) In courts using lists of prospective jurors generated in random order by computer, the clerk may call the jurors in that random order.

(b) The court may permit counsel or the defendant to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court may permit counsel or the defendant to supplement the examination by such further inquiry as it deems proper, or may itself submit to the prospective jurors additional questions requested by counsel or the defendant. Prior to examining the jurors, the court may make a preliminary statement of the case. The court may permit the parties or their attorneys to make a preliminary statement of the case, and notify the parties in advance of trial.

(c) A challenge may be made to the panel or to an individual juror.

(c)(1) The panel is a list of jurors called to serve at a particular court or for the trial of a particular action. A challenge to the panel is an objection made to all jurors summoned and may be taken by either party.

(c)(1)(i) A challenge to the panel can be founded only on a material departure from the procedure prescribed with respect to the selection, drawing, summoning and return of the panel.

(c)(1)(ii) The challenge to the panel shall be taken before the jury is sworn and shall be in writing or made upon the record. It shall specifically set forth the facts constituting the grounds of the challenge.

(c)(1)(iii) If a challenge to the panel is opposed by the adverse party, a hearing may be had to try any question of fact upon which the challenge is based. The jurors challenged, and any other persons, may be called as witnesses at the hearing thereon.

(c)(1)(iv) The court shall decide the challenge. If the challenge to the panel is allowed, the court shall discharge the jury so far as the trial in question is concerned. If a challenge is denied, the court shall direct the selection of jurors to proceed.

(c)(2) A challenge to an individual juror may be either peremptory or for cause. A challenge to an individual juror may be made only before the jury is sworn to try the action, except the court may, for good cause, permit it to be made after the juror is sworn but before any of the evidence is presented. In challenges for cause the rules relating to challenges to a panel and hearings thereon shall apply. All challenges for cause shall be taken first by the prosecution and then by the defense.

(d) A peremptory challenge is an objection to a juror for which no reason need be given. In capital cases, each side is entitled to 10 peremptory challenges. In other

felony cases each side is entitled to four peremptory challenges. In misdemeanor cases, each side is entitled to three peremptory challenges. If there is more than one defendant the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

(e) A challenge for cause is an objection to a particular juror and shall be heard and determined by the court. The juror challenged and any other person may be examined as a witness on the hearing of such challenge. A challenge for cause may be taken on one or more of the following grounds. On its own motion the court may remove a juror upon the same grounds.

(e)(1) Want of any of the qualifications prescribed by law.

(e)(2) Any mental or physical infirmity which renders one incapable of performing the duties of a juror.

(e)(3) Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted.

(e)(4) The existence of any social, legal, business, fiduciary or other relationship between the prospective juror and any party, witness or person alleged to have been victimized or injured by the defendant, which relationship when viewed objectively, would suggest to reasonable minds that the prospective juror would be unable or unwilling to return a verdict which would be free of favoritism. A prospective juror shall not be disqualified solely because the juror is indebted to or employed by the state or a political subdivision thereof.

(e)(5) Having been or being the party adverse to the defendant in a civil action, or having complained against or having been accused by the defendant in a criminal prosecution.

(e)(6) Having served on the grand jury which found the indictment.

(e)(7) Having served on a trial jury which has tried another person for the particular offense charged.

(e)(8) Having been one of a jury formally sworn to try the same charge, and whose verdict was set aside, or which was discharged without a verdict after the case was submitted to it.

(e)(9) Having served as a juror in a civil action brought against the defendant for the act charged as an offense.

(e)(10) If the offense charged is punishable with death, the juror's views on capital punishment would prevent or substantially impair the performance of the juror's duties as a juror in accordance with the instructions of the court and the juror's oath in subsection (h).

(e)(11) Because the juror is or, within one year preceding, has been engaged or interested in carrying on any business, calling or employment, the carrying on of which is a violation of law, where defendant is charged with a like offense.
(e)(12) Because the juror has been a witness, either for or against the defendant on the preliminary examination or before the grand jury.
(e)(13) Having formed or expressed an unqualified opinion or belief as to whether the defendant is guilty or not guilty of the offense charged.
(e)(14) Conduct, responses, state of mind or other circumstances that reasonably lead the court to conclude the juror is not likely to act impartially. No person may serve as a juror, if challenged, unless the judge is convinced the juror can and will act impartially and fairly.

(f) Peremptory challenges shall be taken first by the prosecution and then by the defense alternately. Challenges for cause shall be completed before peremptory challenges are taken.

(g) The court may direct that alternate jurors be impaneled. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. The prosecution and defense shall each have one additional peremptory challenge for each alternate juror to be chosen. Alternate jurors shall be selected at the same time and in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, and privileges as principal jurors. Except in bifurcated proceedings, an alternate juror who does not replace a principal juror shall be discharged when the jury retires to consider its verdict. The identity of the alternate jurors may be withheld until the jurors begin deliberations.

(h) When the jury is selected an oath shall be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the parties, and render a true verdict according to the evidence and the instructions of the court.

Addendum B

ORIGINAL TRANSCRIPT

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

CARL MACK COURTNEY JR.,

Defendant.

Case No. 121901670

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TRANSCRIPT OF JURY TRIAL

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BEFORE THE HONORABLE MICHAEL DIREDA

JULY 15, 2013

THACKER+CO

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would be genealogy, needle work, gardening, those kinds of things.

THE COURT: When your husband was employed what did he do?

MS. : He was the animal control officer for Roy City for 33 years.

THE COURT: Okay, thank you.

MR. ARNOLD: I'd ask the previous gentleman his prior employment. He said they're retired, but did not mention--

THE COURT: Oh, yes. Mr. will you tell us what you did before you retired please?

MR. : Yes. I worked at Hill Air Force Base in a pricing situation.

THE COURT: Okay.

MR. : And my wife was also a teacher, school teacher.

THE COURT: Thank you. Ms. ?

MS. : My name is . I reside in North Ogden. I'm married with two teenagers. I recently retired as a sergeant with the Riverdale Police Department. My husband recently retired from the Weber County Sheriff's Office and now is in private probation and spare time hobbies, we like to camp. I like to run and spend time with my family.

THE COURT: Okay, thank you. Mr. ?

MR. : Yeah. My name is ( ). I live in Roy. I'm married. Have two little girls. One is about

THE COURT: --Ms. ?

MS. : Yeah. I'm . I live in Ogden. I am separated. I have three kids: 8, 13 and 14. I'm currently unemployed and spare time is painting, spending time with my kids, playing outdoors.

THE COURT: Thank you. Ms. ?

MS. : All right, my name is . I live in Ogden City. I am currently single. No children. I work in a bakery and a pizza delivery and spare time really it's just camping and reading.

THE COURT: Okay, thank you and finally Ms. ?

MS. : I am (. I live in Uintah. I am married. I have three children. I have an almost two year-old, a seven year-old and a nine year-old and right now I currently stay at home with my family. My spouse's occupation, he's the chief technical officer at Mountain Alarm and I like to read, workout, hang out with my family as a hobby.

THE COURT: Thank you. All right ladies and gentlemen, I'm now going to ask the attorneys to introduce themselves, the parties and witnesses to see if you know or are acquainted with any of these individuals. Mr. Arnold you may proceed first.

MR. ARNOLD: Hello. My name is Gage Arnold. I work for the Weber County Attorney's Office. I'm the prosecutor in this case. I've worked in the Weber County Attorney's Office for about three years. Seated here to my left is Jason Vanderwarf.

He is a detective of the Roy City Police Department. We also expect to call as witnesses in this case Courtney Ryan who is a Deputy with the Weber County Sheriff's Office and also Beau Smith. She is a forensic--well she's a toxicologist with the Utah State Crime Lab and she tests controlled substances and also I guess we should probably include Teresa Small. She's an evidence custodian for the Ogden City Police Department.

Does anyone know me or any of the people that I've listed? I see a few hands. Ms. ?

MS. : Do you want me to stand?

MR. ARNOLD: If you would. Thank you.

MS. : I know Jason.

MR. ARNOLD: From work I would suppose?

MS. : Yeah, work. We're friends.

MR. ARNOLD: Okay, great. Mr. ?

MR. : My wife went to school here with Gage and was friends with him and I also went to school and played sports with Courtney Ryan.

MR. ARNOLD: I guess let me ask you Mr. is there anything about the relationship, the fact that I went to school with your wife or that we played sports with Mr. Ryan, is there anything about that that would cause you to favor one side over the other?

MR. : I would say no. I don't really know you as much. It was more my wife went to school with you. I'm just

familiar with you. I met you. Courtney, I haven't seen him since high school really. So, yeah. Nothing.

MR. ARNOLD: Thank you. I believe [inaudible]

WOMAN: I know Jason through mutual friends and Courtney Ryan is the step-father to my nieces and nephews.

MR. ARNOLD: Is there anything about that relationship that would cause you to favor one side or the other?

WOMAN: No.

MR. ARNOLD: Thank you.

THE COURT: Mr. Young would you like to conduct any follow-up on either of these three witnesses at this time?

MR. YOUNG: No, Your Honor.

THE COURT: Okay, thank you. All right. Mr. Young let me allow you to introduce yourself and any witnesses you intend to call.

MR. YOUNG: My name is Sean Young. I'm a criminal defense attorney here in Ogden. This is Carl Courtney. He's the defendant in this case and we intend to possibly call Mr. Courtney as our only witness in this case. Does anybody know myself or Mr. Courtney?

MS. : Due to my years in law enforcement, yes. I have had affiliations with him, especially during the time that I was serving as an agent for the Weber-Morgan Narcotics Strike Force.

WOMAN: Mr. Young represented my husband in a case.

MR. YOUNG: Thank you.

THE COURT: All right ladies and gentlemen, as I indicated to you at the outset this is a criminal trial in which the defendant Carl Mack Courtney, Jr. has been charged by information which has been duly filed with the commission of distribution of or arranging to distribute a controlled substance. To the best of your knowledge and memory has any one of you heard or read anything about this case? If so would you please raise your hand? All right, I don't see any hands raised.

GENTLEMAN: Sorry.

THE COURT: Oh, I'm sorry.

GENTLEMAN: Previously to today?

THE COURT: Yes, previous to today.

GENTLEMAN: Okay.

THE COURT: All right, the next questions go to your prior jury service. If any of you have had the opportunity to serve on a jury previously, please raise your hand. All right. What I'd like to know, starting with you Mr. , is when your jury service was, what kind of case it was if you remember and what the result of that case was, what the outcome was.

MR. : I believe it was 1982. It was Judge Wahlquist's Court. I had one other previous jury duty, but it was in Mississippi a couple years prior to that before my moving out here. The case here was a civil case. Well, I guess you

teenager. So--

THE COURT: Okay. Okay, the next question. Would any of you have difficulty in affording the defendant his guarantee of being considered innocent until proven guilty beyond a reasonable doubt or stated differently would any of you believe that because the defendant has been charged in this case by the State that there must be some basis for his guilt?

Ms. . before you respond, perhaps what we ought to do--may I see counsel at the bench for just a moment please? Will you hold off on your response? Thank you.

[Discussion at bench.]

THE COURT: We dodged a bullet the first time.

MR. YOUNG: No, we didn't. We--

THE COURT: Well I mean I guess what I'm saying is we didn't dwell on it. We didn't linger on it. I recognize what you're saying, but the problem is there's no way to anticipate that she would say what she said. I mean--

MR. ARNOLD: But the question was do you know Carl. I knew that she would strike.

MR. YOUNG: There's no previous strike orders.

MR. ARNOLD: Well, we don't, but you know she's been at Riverdale P.D. for a long time.

THE COURT: Well I don't think there's any question that she is gone. I guess the bigger issue though is I don't want her tainting the pool and if we have an issue now where you

already feel that she has done that, then we need to make a record on it because I don't want to plow through, pick a jury of eight and then have this become an issue. I mean I guess I don't know how we're going to determine whether she has tainted the pool or not.

MR. ARNOLD: I mean what if we stipulate that she be excused?

THE COURT: Now?

MR. ARNOLD: Now.

MR. YOUNG: But that's kind of [inaudible]

THE COURT: Well you tell me what you--

MR. YOUNG: I don't know how to handle this. I don't know how to handle this. We can take her back in chambers. We can always take her back in chambers or everyone is going to know what's going on.

THE COURT: Well, okay. Then if I don't take her back in chambers, then I just allow her response in open Court. What do I do? She stood up now. I've got to do something.

MR. ARNOLD: I would say that we--I mean given her prior you know, I mean relationship with the facts, I mean the Strike Force and everything, I think we need to just cut her right here and just say thank you.

MR. YOUNG: [inaudible]

THE COURT: Well let me try to handle it in a different way. I think what I'm going to do is I'm going to ask her if

her husband is . I know he is. He's a probation guy from Alliance--or, no, Utah Alternative and I'm just going to indicate this from the fact that her husband works in my Court that maybe it would be appropriate to let her go and I won't even draw attention to the law enforcement, Weber-Morgan Narcotics Strike Force [inaudible] I'll just connect it to the probation issue. Kick her loose for that reason and just leave it alone.

MR. YOUNG: You can just tell them that [inaudible] because her husband is working for--

THE COURT: No. I think I'm just going to let her go because the real--

MR. YOUNG: Have her walk out right now?

THE COURT: Well if I base it on the probation connection, I don't think I create a problem. The problem that I have is if I leave her here, what are we going to do every time there's a question? She's going to stand up and I'm going to shut her down and it just draws more attention to her.

MR. YOUNG: If she walks out right now.

THE COURT: Well all it does is draw attention to the fact that her husband is a probation officer in my Court and for that reason I'm going to just act like--

MR. YOUNG: [inaudible]

THE COURT: Well, okay, but then what do you--

MR. YOUNG: I don't know that that's the best way to

handle it.

THE COURT: Well, but you've got to do more than tell me that you don't like my approach. You've got to offer a suggestion.

MR. YOUNG: That's the best approach as possible at this point, what you're suggesting.

THE COURT: I think I say well you're likely to be excused. If I leave her there then every question I ask has the potential for her--

MR. ARNOLD: What about some follow-up? Excuse her and then follow-up with the jurors based on--

THE COURT: Well, I had no idea she was going to say she knew Mr. Courtney.

MR. ARNOLD: I had no idea. I had no idea.

THE COURT: I mean I thought she would say she knew you. I didn't know she would say she knew [inaudible]

MR. ARNOLD: That's [inaudible] I agree. That's what I would--

THE COURT: And once it was out there was nothing I could do. I couldn't unring the bell. Well, you tell me what you want to do. If you feel that because of that the jury has been tainted, because I mean that sort of goes to the whole 404 issue. You weren't going to get into 404 unless they opened the door. Well she kind of did that in a very roundabout way without being specific.

MR. ARNOLD: I agree.

THE COURT: But I mean I'll--

MR. ARNOLD: What if we did this? She's excused based on the probation [inaudible] and then some colloquy, some questions. You heard this witness or this potential juror talk about her relationship with Mr. Courtney. Do any of you jurors--has that affected--are you able to maintain--

THE COURT: What do you think about trying to ferret out the reason [inaudible] The problem is it's a loaded question. If they're smart, they say yes and they know they're gone. That's the problem.

MR. ARNOLD: That's true. [inaudible]

MR. YOUNG: Well, if they want to be on the jury, they'll say no. They're tainted.

THE COURT: And they say no. I understand. Well I don't profess to have all the answers.

MR. YOUNG: I have less answers than you.

THE COURT: Well I'm not sure that you do.

MR. YOUNG: Let's get her out on the probation itself.

THE COURT: Okay. All right.

Ms. , before you answer, I was discussing with Mr. Young and Mr. Arnold, both attorneys who are assigned to my Court on Thursdays, if Mr. , who is also assigned to my Court is your husband.

MS. : Yes, Sir.

THE COURT: Okay. I wasn't sure when you said that and I was trying to make the connection and then it occurred to me he's relatively new in his position with the probation company that he works for. Is that right?

MS. [redacted]: Right.

THE COURT: I mean not brand new, but new enough that I'm just not used to having him all the time. The discussion that we had at the bench was based on the fact that your husband comes to my Court every Thursday as a probation officer for that private probation company, I think it would be better to just excuse you at this time. I think that just the fact that I have that, that he's working in my Court with other probation entities, I think creates enough of an issue that beyond your own experiences and things, I think that's probably enough.

So rather than have you stay here only to excuse you at the end, I think what we'll do is just let you get on your way now if that's okay with you.

MS. [redacted]: That's fine with me Your Honor.

THE COURT: Okay, thank you.

MS. [redacted]: Thanks.

THE COURT: Appreciate your time. All right. So let me repeat the question and I apologize for the interruption. Would any of you have difficulty in affording the defendant his guarantee of being considered innocent until proven guilty beyond a reasonable doubt or stated another way would any of you

believe that because the defendant has been charged in this case by the State, that there must be some basis for his guilt? All right. I don't see any hands raised. Thank you.

Would any of you give greater weight and/or credibility to law enforcement testimony over other witnesses' testimony simply because the testimony is coming from a law enforcement officer without listening to it and evaluating it? You just automatically assume that it's more believable because it comes from a law enforcement officer. Would any of you feel that way? Okay. I don't see any hands raised. Thank you.

Next ladies and gentlemen I would indicate to you if you are selected as a juror in this matter, your responsibility will be to determine and weigh the facts of this case. You are going to do that from the evidence that's presented here in the Courtroom and from your own common sense and experience. My responsibility is to instruct you in the law that is to be applied to the facts as you find them. I can't interfere with your responsibility to find the facts. You are however obligated to follow the law as I instruct you on the law. Are there any of you that believe you would not be willing to follow the law as I give it to you? All right.

Finally, and this question may come off initially as a little confusing, but I think you'll understand what we're driving at. I would like each of you to place yourself in the position of the plaintiff or the State and the defendant in this

lawsuit. If you were in their positions selecting a jury, are there any of you who would not want a juror with your present views or state of mind sitting in judgment? If so would you raise your hand? This is the sort of mirror question where it asks you to look at yourself in the mirror and say would I want me judging me? I don't see any hands. Thank you.

Mr. Arnold are there any additional questions that you would like the Court to ask the panel at this time?

MR. ARNOLD: No. That's fine.

THE COURT: Mr. Young any additional questions you would like me to ask or any follow-up you would like to conduct?

MR. ARNOLD: No, Your Honor.

THE COURT: All right, thank you. Counsel then may I see you at the bench again and I apologize for this white noise. I know it's terrible. It's the State of Utah's best way in which to block out the sound that's occurring here at the bench. You'd think they could provide you with some nice elevator music or something, but instead we give you this horrible white noise. So I apologize. It's what they gave me.

[Discussion at bench.]

THE COURT: All right. The Jeopardy tune. That would be good as well. Okay. So let's see. I need to make that note that I let Ms.--where is she? Oh, yeah, right there--that I excused her. All right let's just work our way down. Any problem with number 1?

BAILIFF: No. That's the only one that's clean. Every other one I saw had something up here, defense, bailiff, in Court clerk.

THE COURT: Okay. All right. Then I'll hand that to you.

BAILIFF: Okay.

THE COURT: Mr. Arnold do you pass the jury for cause?

MR. ARNOLD: I do.

THE COURT: Mr. Young do you pass the jury for cause?

MR. YOUNG: Yes.

THE COURT: Thank you. Now ladies and gentlemen each of the parties has a chance to disqualify four of you from serving on the jury for a total of eight. They can do that for any reason and you shouldn't take it personally. I wouldn't imagine that you would. You'd probably celebrate actually, but some people, believe it or not, get offended. I mean they walk out thinking why in the world didn't they select me? I'm the perfect juror. If they were to have, you know, in the dictionary juror, my picture should be there because I'm the person that should be on this jury and all I can tell you is that when I was an attorney, before I became a judge, I had my own theories of the kinds of people that I wanted on my jury and when I won, my theories were validated and when I lost, I went back to the drawing board and reconsidered my theories.

They can excuse you for any reason. They can look at the clothing you're wearing, the way you comb your hair, what you do

BAILIFF: So we have ,

.

THE COURT: All right ladies and gentlemen, now that you're comfortable in your seats, I'm going to ask you to stand, raise your right hand and my Clerk is going to swear you in as the Jury that's been selected in this case.

THE JURY PANEL IS SWORN.

THE COURT: All right, thank you. You may be seated. Now as I indicated to you, I'm going to let you take a short break to use the restroom, make phone calls, get a drink, whatever you need to do and then when you come back in I will read you the initial set of jury instructions, invite the attorneys to make their opening statements and begin presenting evidence and then we'll just kind of see where we are time wise.

Now that I've got you there, do you have any thoughts about how you would like me to handle the lunch, whether you would like a shorter lunch or a longer lunch? Nobody has a preference? Counsel, back at 1:30 or 1:00? What would you prefer?

MR. ARNOLD: Could we see how far we get?

THE COURT: Okay.

MR. ARNOLD: Is that okay?

THE COURT: That's fine. You bet.

MR. ARNOLD: Just during the break we've got a few things to set up.

THE COURT: Okay. All right, then we'll be in recess for let's say--what do you think? Ten minutes is adequate?

MR. ARNOLD: At least ten.

MR. YOUNG: Go 15 just to be safe.

MR. ARNOLD: Let's go 15.

THE COURT: All right. We'll be in recess for 15 minutes. That should be plenty of time for you to get oriented in the back and then we'll reconvene and proceed as I've outlined. Any questions that you have of a general nature? Okay, thank you.

BAILIFF: Okay, just a reminder. On that back row, watch that step. We did have one juror take a tumble off of there.

[Jurors leave the Courtroom.]

THE COURT: All right. The record will reflect we're outside of the presence of the jury. Anything that we need to discuss at this time?

MR. YOUNG: Possibly. I'd like to make a record at least of what took place with Juror Number 5.

THE COURT: All right, you go ahead.

MR. YOUNG: Just to the possible jury tainting issue with what happened with Number 5. Officer was actually involved in controlled buys with my client before. He testified at a grand jury on issues where she set up controlled buys when she was a Weber-Morgan Strike Force Agent. She made comments to that end here today that she knew my client due to her involvement with the Weber-Morgan Strike Force department, when

she was working with them. She made reference knowing my client in that capacity in front of all the jurors.

So I mean there's a possible issue. You know, I was looking not at her, but other jurors' faces as she was making the comments and there were a couple of jurors that kind of you know piped up when they were listening to what she was saying and so you know there might be some issues with 404(b) evidence where my client doesn't testify about prior bad acts coming in and she's now told them about her prior involvement. She didn't go into detail like I am now, but she made reference to the fact that she knew my client due to her involvement in the Strike Force work in the past.

THE COURT: Mr. Arnold?

MR. ARNOLD: Your Honor, I mean we knew that Ms. was a law enforcement officer and what was absolutely surprising was the fact that she knew and responded to the question of knowing Mr. Courtney. I think that what the Court has done by excusing her based on another reason, I think that we're safe to proceed at this point.

THE COURT: Let me make a record. Counsel approached. We discussed prior to Ms. answering the question that pertained to whether or not she could afford the defendant his presumption of innocence or whether she would assume that simply because he had been charged that he was guilty of the offense and she raised her hand. Before allowing her to respond the

Court invited counsel to the bench. We discussed the difficulties that were created by Ms. 's unanticipated answer to the question that we always ask; which is do any of you jurors know either of the attorneys or any of the witnesses and we always include of course the defendant, not anticipating Ms. would go into detail about how she knew Mr. Courtney, but rather just that she did. I think again to make the record clear, she indicated that she knew Mr. Courtney and was familiar with him from other cases and then I think as you correctly noted Mr. Young, I think she did specify from her work with--I don't know the words she used exactly, but her association for sure with the Weber-Morgan Narcotic Strike Force.

There was no follow-up done. The Court did not inquire into any of the specifics. Allowed the questioning to proceed with the other jurors. No follow-up was conducted from counsel at that time or any other time with Ms. and in an effort to try to avoid drawing additional attention to her earlier response, when the Court perceived that further responses by her could certainly have the potential of tainting the Jury, the Court made the determination to excuse her because her husband who is a private probation officer working for Utah Alternative Programs and is assigned to my Court essentially has contact with the Court on a weekly basis and for that reason excused Ms. not drawing any additional attention to her

association with the Strike Force or any connection to Mr. Courtney.

I think there was discussion about questioning the remaining members of the Jury to determine to what extent, if any, that jury panel was influenced by her responses and I think, and if I'm wrong about this you correct me, but I think the decision was rather than draw more attention to that, we would allow the dust to settle and simply move on and excuse her and so that was a decision made by counsel and of course with the Court's approval as well.

Anything that you want to clarify about what I've said?

MR. YOUNG: The only issue is also that that's when it kind of came to the forefront was when the Court asked can anybody here not afford him the right of innocence until proven guilty. That's when she popped back up and we kind of quashed. So I mean she's the only person that raised her hand to that question. It kind of drew attention to her again and the Court did the best the Court could to quash the issue when it arose, but I mean up to that point there's possible bias already and maybe tainting of the jury pool at that time.

THE COURT: Well maybe I just need to ask Mr. Young and maybe we need to recess and give you some time to think about it, but I sort of broached the subject with counsel at the bench. Are you asking the Court to--well, we have a couple of problems.

MR. ARNOLD: The Jury has been sworn.

THE COURT: They have, but I think--and you correct me if I'm wrong because I've not had this issue. In a jury trial is it when the jury is sworn or is it when the first witness takes the stand?

MR. YOUNG: When the jury is sworn.

MR. ARNOLD: When the jury is sworn.

THE COURT: Okay. Well, so the problem that I have is I invited a challenge to going forward. I said are you making the claim that the jury has been tainted and we should not have a trial and that motion was never brought or even alluded to at the bench.

MR. YOUNG: Well I said I needed to make--I thought I said up there pretty clearly that I need to make a record of this at some point, but there was never a break again between the Jury being selected. I didn't know at what point to make that. The Jury was in the room the whole time, but I did allude to the fact up there I needed to make a record of this, make a--at least put on the record my objection to it. I thought I made that pretty clear up at the bench.

MR. ARNOLD: The issue--I have to go back and read my Fifth Amendment stuff, but I think that once the Jury is sworn, I mean all bets are off for the State.

THE COURT: Jeopardy attaches.

MR. YOUNG: Yes.

MR. ARNOLD: Jeopardy attaches. All bets are off for the State. We've got to move forward with where we're going and however the case may be or may result, but I mean there was some--I thought that from the conversation that we had that the dust had settled as the Court had indicated and so I don't think that the objection at this point is timely, if it is an objection.

THE COURT: And I think that's my concern is that I don't feel like there was ever a formal--I mean there was reference made to making a record, but never a formal indication that a motion to declare a mistrial and re-set the trial was ever made. I mean I think Mr. Young expressed concerns as did the Court, but I don't think the Court was advised that there was going to be a motion for mistrial.

MR. YOUNG: That's correct. I didn't make that motion.

THE COURT: And I want to make that clear because I think it does affect the procedure and the way I handled it because had I anticipated that, I would have entertained that motion prior to swearing the Jury in of course to avoid the jeopardy issues and because I didn't perceive that that motion was going to be brought, I went ahead and swore the Jury in and then allowed us to just make this record for the sake of making a record.

MR. YOUNG: But see? I haven't had a chance to talk to my client about his concerns about it either. I mean we just kept

rolling so I thought--and I missed the Court swearing the Jury. I was re-organizing and shifting sides and wasn't paying attention when you were swearing the Jury in. So I actually want for the jeopardy to attach, but I wasn't paying attention as I was going on. I was trying to re-arrange and my client was asking me a question and so I didn't catch the issue, but I had every intention of bringing it to the record because he leaned over and made some comments to me. I didn't want to draw more attention from the Jury panel as we were selecting them about what was taking place, but he does have a concern about the jury pool being tainted based on Juror Number 5's comments.

THE COURT: Well I don't quibble with Mr. Courtney's concerns. I think the issue is that it was discussed at the bench Mr. Courtney. I asked the attorneys if they wanted to conduct follow-up to ferret out whether or not there was that taint and the response that I received is no. We don't want to further the problem. We don't want to make it worse than perhaps it already is.

So we're just going to leave it alone because she made one comment and it was quite some time ago, kind of early on in the voir dire. I mean at the very beginning of the voir dire when the jury was asked do you know Mr. Young or Mr. Courtney and I'm just going to find at this point in time that there has not a motion been made. There wasn't one made at the time she made the response. There could have been one made at that juncture.

The minute the response was made we could have excused the panel and you could have made that motion right at that moment or we could have had discussion about ferreting out the poisoning effect, if any, that the rest of the jurors experienced from her response. That was not done and even as late as right before the jury was selected there was no motion made and so I'm just going to find that at this point the motion is untimely.

I think the concerns have been expressed and placed on the record. I respect them. Ms. made one comment and was not allowed to answer the second question when she stood up. I stopped her from responding and then that was when we excused her. So we have the one response on the record. I think you've indicated what that was and so we're going to move forward.

I mean to the extent that you are making a motion for mistrial, and I don't know that you are, because you haven't, but I mean are you making that motion?

MR. YOUNG: Well I haven't had a chance to discuss that with my client. I'd like to--I mean I guess during this recess I can discuss that with my client. I haven't had a chance to discuss it.

THE COURT: Okay. You talk to your client about it and let me know. Anything else?

MR. ARNOLD: I don't have anything currently. I think Mr. Young, nothing that we can't handle, but we may just need a few

extra minutes.

THE COURT: Okay. Understood. Thank you.

[RECESS.]

[Discussion at the bench.]

THE COURT: I'm not trying to make more of this than needs to be made, but I have a couple of concerns that I'd like to just kind of flush-out and express the first of which is this. I think, and I understand how we get on a roll and we things just keep going and going and going and it's difficult to kind of call a time out and say I need to go talk to my client. I mean I understand logistically how that can be awkward.

The flip side is as I'm looking back over this selection process I'm thinking there were plenty of chances we had to try to cure it or fix it before we swore the Jury in. I mean and as I reflect on some of the things we could have done, well one of them would have been right at that moment to either make the motion or approach and make the motion or start calling the jurors back individually so as to not have them answering in front of everybody and asking them you know is there anything about what Ms. said that you feel is going to influence you? We didn't do that, okay? It is what it is. I'm not being critical. I'm just saying we were all trying to figure out how to solve it and we were struggling.

So now we're in a posture where you haven't made a motion. You may make the motion. I don't know if you will or won't,

but the likelihood that I'm going to grant it is very slim mostly because of untimeliness. So great for you, right? I mean in the sense that you don't have to worry about jeopardy attaching and him walking, but the bigger problem that I have is we always have looming out there ineffective assistance of counsel, always, and despite attorneys' best efforts, their performance is called into question.

Here we have what I perceive as a pretty significant situation. Maybe you disagree. I don't know what appellate counsel would say about Mr. Young's performance with respect to this issue and whether he should have done something and didn't.

MR. ARNOLD: We spoke about that and I think we talked that this is probably, at this point, it's untimely. So ineffective assistance would be the claim that would be made up on appeal. I think that Mr. Young had a reasonable trial strategy for not, you know, I guess at the time raising more of a raucous. So--

MR. YOUNG: I didn't know where I was supposed to make the timely--I thought it was after the jury was picked I was supposed to make my [inaudible] Ineffective obviously. I mean I brought it to the Court's attention I thought up here where I thought I made it pretty clear that I needed to make that a record. I thought we were making a record up here.

THE COURT: Well my issue is I just don't want to try this again in a year or two years because they send it back on an

ineffective assistance.

MR. ARNOLD: Well that's probable now.

THE COURT: I mean that's my concern. I'm just being as frank as I can be. I just don't want it coming back.

MR. ARNOLD: I agree. No, I think that there's--

THE COURT: And I don't know how to cure it at this point and maybe we can't and I don't know whether or not there was any wiggle room in negotiating. That's still the potential to be explored. I mean the problem was created through no fault of ours. I mean it was created by a juror who quite honestly, in my opinion, ought to be bitch-slapped because--

MR. YOUNG: She knew better.

MR. ARNOLD: Yeah.

THE COURT: --I mean for her not to understand the tainting that she was creating when she said that, it's hard for me to--

MR. YOUNG: If I had known she was Strike Force I would have said something earlier. You knew she was Strike--

MR. ARNOLD: I had heard. I haven't dealt with that.

THE COURT: But the problem is you still didn't know whether she knew him or not. I mean none of us knew that--

MR. ARNOLD: No. I had no idea.

THE COURT: --and the question was a yes or no question.

MR. YOUNG: No one anticipated it.

THE COURT: It was not--

MR. ARNOLD: Does anybody know--

THE COURT: --how do you know. It was just do you know. So are we on or off? Okay. I just wanted to make sure. Yeah, that's fine.

COURT CLERK: [inaudible]

MR. ARNOLD: Yeah. So, I mean as far as the [inaudible] I'm not coming off of seconds. He wants thirds. He has earned seconds and so I gave him an offer in which we would dismiss certain cases of his. The offer is still--I mean I'll leave that open currently. If he wants to take the offer, then that's fine.

THE COURT: I'm just so frustrated with--

MR. YOUNG: [inaudible]

MR. ARNOLD: [inaudible]

MR. YOUNG: Well the thing is he thought there was a video. We told [inaudible] that we were looking for a video on it. We found there's no video. Audio is pretty--I mean you can't tell whether he was in the room or not which can be Vanderwarf's testimony. Vanderwarf got killed in the papers in the Stewart trial and no one reads the paper. [inaudible]

MR. ARNOLD: [inaudible]

MR. YOUNG: It doesn't matter. It's public opinion.

MR. ARNOLD: Well I mean here's the--you want to listen to the tape, listen to the tape.

MR. YOUNG: I've heard the tape. I've heard the tape.

THE COURT: Okay. Well it is what it is. I was just trying to avoid appeal issues down the road.

MR. YOUNG: I'm sure there's going to be an appeal.

THE COURT: It's like I said. That juror should be slapped for--I mean that's an extreme statement, but it just reflects the frustration of the Court that she would go beyond the simple question of do you know and offer what she offered. It's so frustrating to me.

MR. ARNOLD: Then the other option that we have I think is for him to waive--I don't know. This is just thinking outside the box--for him to waive any double jeopardy concerns that could come back on another day.

MR. YOUNG: I don't think we can waive double jeopardy. Can we do it?

THE COURT: I don't know.

MR. ARNOLD: I can call over to the office and see what the chiefs think.

THE COURT: Well it's your guys' case to try. So you do what you want to do as far as how we go forward. If you want to just call the Jury back in and get going, that's what we'll do. I mean I've got the instructions. I'm ready to go. I just wasn't sure if you had thought through the appellate issues that are created by it.

MR. ARNOLD: [inaudible] Talk to him about that or just go forward?

THE COURT: I mean does he want to come back and re-try this in a year? I can't imagine he wants to do that any more than the rest of us.

MR. YOUNG: He thinks he's going to win.

THE COURT: But let's assume he doesn't.

MR. YOUNG: I've had this conversation with him.

THE COURT: Oh, okay.

MR. YOUNG: He can appeal.

THE COURT: Okay, but my point is let's assume he wins his appeal. He's back here re-trying this case in a year. Does he want to do that? I mean do you have--okay. Okay. I'm not trying to elicit--

MR. YOUNG: He's got six felony cases pending.

THE COURT: Yeah. I understand.

MR. YOUNG: He's going to be in prison that whole time, five six times [inaudible]

MR. ARNOLD: [inaudible]

THE COURT: Okay. Well I guess he'll have to appeal then. Do you want to make the motion then before?

MR. YOUNG: Yeah.

THE COURT: Okay. All right.

Okay, before we bring the Jury in, Mr. Young let me turn the record over to you. Do you have any motions you wish to make?

MR. YOUNG: Yes. I'd like to make a motion for a mistrial

due to the tainting of the jury due to Juror Number 5's comments [inaudible]

THE COURT: Mr. Arnold a response?

MR. ARNOLD: I believe that the objection is untimely now that the Jury has been sworn.

THE COURT: I think the Court is going to find in this particular case that this disclosure that we're talking about occurred early on in the jury selection process. Specifically, it was shortly after each juror indicated their name, residence, married or single, children, education, occupation, I introduced--the attorneys introduced themselves and their witnesses and it was in response to the question do you know Mr. Young or Mr. Courtney, his client, that Juror Number 5 responded that she did through her experience with law enforcement, specifically with the Narcotics Strike Force because of other case involving Mr. Courtney.

Now she did not specify Mr. Courtney's role in those other cases. Did not indicate whether or not he was a victim in other cases, whether he was an informant in other cases. She never specified exactly how Mr. Courtney was involved in those other cases and so to that extent I think the statement was generic, innocuous, non-specific. She wasn't allowed to elaborate beyond that. There was no motion made at that time, no motion made during any of the rest of jury selection and when Juror Number 5 prepared to answer the question of whether or not she would be

able to afford the defendant his presumption of innocence until the State proved beyond a reasonable doubt its case, she raised her hand and was going to respond to that question. Was not allowed to and was then excused because her husband is a private probation officer who is assigned to this Court and that was the reason she was excused in an effort to not draw any further attention to her earlier response.

There was discussion at the bench again about how to fix the problem. There was no request to individually question each of the remaining jurors to determine whether there was taint. The decision that was made was to not draw any further attention to Juror Number 5's earlier response and to proceed with the selection process.

After the attorneys were asked if the jury selected was in fact the jury that they had intended to select and each responded in the affirmative, and even during the moment in time when the remaining members of the jury panel were excused and we were seating the eight that were selected, no motions were made. Attorneys did not ask to approach the bench to discuss the need to make a motion and so the jury was subsequently placed under oath to serve in this case.

Based on the numerous opportunities that existed to bring this motion previously, I'm going to find that the motion is untimely and I'm going to deny the motion for mistrial in this case.